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LKL TRADING SDN BHD & ANOR

v.

BUKIT JALIL DEVELOPMENT SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ZABARIA MOHD YUSOF J
[SUIT NO: S-22-420-2010]
19 OCTOBER 2010

C ***CONTRACT:*** *Damages - Claim for consequential losses - Plaintiffs claiming for loss of investment opportunity - Whether allowed - Factors to consider - Effect of - Contracts Act 1950, ss. 74 & 76*

CONTRACT: *Misrepresentation - Sale and purchase contract - Plaintiffs entering into a sale and purchase of property contract with defendant based on* D *representations made - Whether representations made induced plaintiffs to enter into contract intended as warranty - Effect of - Defendant failing to hold up their end of bargain - Whether amounted to fundamental breach which had gone to root of contract - Factors to consider - Plaintiffs terminating contract and claiming for refund of deposits - Whether they were entitled to it - Whether* E *defendant unjust in withholding deposit payments from plaintiffs*

The plaintiffs purchased two units of office lots from the defendant in a "Jalil Green City" project ('project'), based on certain promises and representations made by the defendant. Unfortunately, the representations and promises made by the defendant were not fulfilled and the project F did not commence on time. The plaintiffs proceeded to terminate the contract and sought from the defendant a refund of the deposits paid together with a claim for compensation for the "loss of investment opportunity". Enclosure 3 was the summary judgment application by the plaintiffs against the defendant in relation thereto. The defendant, on the G other hand, claimed that the plaintiffs had no right to claim for the refund of the said deposits as the same had been forfeited by the former due to the latter's breach of contract *ie*, in their failing to complete the sale and purchase of the units, by their action of terminating the contract. The sole issue that arose for consideration was H whether the plaintiffs' claim for summary judgment pursuant to encl. 3 should be allowed.

Held (allowing the plaintiffs' claim):

(1) Based on the defendant's representations that the project would take I off in February 2010, and that various financial facilities from various banks would be provided to assist the plaintiffs in obtaining loans to finance the project, the plaintiffs had been induced to enter

into the contract with the defendant and they had paid deposits for the two units. These representations had clearly been proven to be untrue. The representations had been intended as a warranty, to be acted on, and the plaintiffs had so acted upon it. Hence there had been a fundamental breach by the defendant which had gone to the root of the contract/agreement between the plaintiffs and the defendant. The defendant had been unable to perform its side of the bargain and it was unjust of them to have retained the deposits paid by the plaintiffs. The plaintiffs had rightfully issued the termination notice to the defendant and the latter ought to refund the deposits back to them. (paras 29-31)

(2) On the claim for "loss of investment opportunity", the plaintiffs had contended that it had been allowed under s. 74 and 76 of the Contracts Act 1950 and accordingly it would be allowed, its amount to be assessed at a later date. (paras 33 & 35)

Case(s) referred to:

Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor [1999] 1 CLJ 1 SC ***(refd)***

Kuthubul Zaman & Anor v. TJB Development Sdn Bhd & Anor [2010] 8 CLJ 529 CA ***(refd)***

Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight [1983] 1 CLJ 77; [1983] 1 CLJ (Rep) 394 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14
Contracts Act 1950, ss. 56, 74, 76

For the plaintiffs - Christopher Lai King Lung; M/s Chris Lai, Yap & Partners
For the defendant - Rudeen Chuah; M/s Rejendren & Deen

Reported by Sharmini Pillai

JUDGMENT

Zabaria Mohd Yusof J:

[1] Enclosure 3 is the application by the plaintiffs for summary judgment pursuant to O. 14 Rules of the High Court 1980 ie, for a refund of the deposits totalling RM604,600 paid by them towards the purchase of two units of office lots from the defendant in a "Jalil Green City" project (hereinafter referred to as "the project") together with compensation of RM60,460 being "loss of investment opportunity".

A **Background**

[2] The plaintiffs claimed that they were invited by the defendants' representative on 21 December 2009 to purchase five storey lots in the project based on the defendant's representation *inter alia*:

B (i) The defendant had obtained the development order to commence the project on February 2010.

(ii) Plaintiff were required to pay the total 10 % of the purchase price instead of 2 % deposit to enable the project to kick-start on time ie, on or before February 2010.

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(iii) Various banks financial facilities are provided by the defendant to assist the purchasers to obtain their loan to finance the project.

[3] The plaintiffs claim that due to the defendant's representation D above, plaintiffs had placed the booking for two units of a five storey shop lots and paid 10 % of the purchase price to the defendant.

[4] However, the plaintiffs alleged that defendant had failed completely in its promises and representation and failed completely to commence the project on time as agreed on or before February 2010. Hence, the E plaintiffs had terminated the contract *via* the termination letter dated 15 April 2010 and 5 May 2010 and seek for a refund for the amount of deposit paid to the defendant on 24 December 2009 amounting to RM604,600 for the purchase of two units five storey shop lots.

F **[5]** The plaintiff contended that this is a clear case for summary judgment because the plaintiff terminates the contract due to the misrepresentation of the defendant when the plaintiff was invited to purchase the property.

[6] The plaintiff further contended that the defendant had expressly G admitted at p. 161 of its annual financial report that there is no development order for this project which is still pending approval from DBKL.

[7] The plaintiffs alleged that they have relied on the defendant's H representation to pay the 10 % deposit on the said project which should commence on February 2010 as promised by the defendant. However the defendant failed to deliver the same and the plaintiffs have been prejudiced with the defendant's internal dispute that is still persisting until to date and no certainty to the commencement of the project.

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[8] The plaintiffs also submit that there is no justification for defendant to withhold the plaintiffs' payment since defendant had expressly admitted in its annual report that they had received deposits from the plaintiffs for the said project but failed to make any refund of these booking fees or deposit to the plaintiffs.

[9] The defendant on the other hand raised several issues and defence. The defendant states that the plaintiff's decision to purchase the property based on their volition without any misrepresentation and is subjected to the execution of a formal sales and purchase agreement.

[10] The defendant further contended that the failure by the plaintiff to secure the loan facilities has got nothing to do with the defendant nor was it proven to be caused by the defendant. Such failure is irrelevant as it is not a pre-condition to the plaintiff's obligation to purchase.

[11] Essentially the defendant claims that the plaintiff have no right to claim for a refund of the said deposits which are forfeited by the defendant due to the plaintiffs' own breach of contract in failing to complete the sale and purchase transaction of the units by terminating their contract to purchase. On that basis the plaintiffs have no right to claim for the refund of the deposits which are forfeited by the defendant.

[12] The defendant contends that the plaintiffs' claim of compensation for the investment loss opportunity, which is equivalent to 10 % of the deposit, is without basis.

The Courts' Findings

[13] The plaintiffs claimed that they have relied on the representations of the representatives of the defendant when making the purchase of the units. The representations are reproduced below:

(a) defendan telah memperolehi Perintah Pembangunan untuk projek tersebut di mana projek tersebut akan di bangunkan dengan kerja-kerja tapak akan bermula pada atau sebelum Februari 2010;

(b) Terdapat sebuah hypermarket yang bernama "Jaya Jusco" telah diluluskan untuk dibina di Parcel A yang terletak di sebelah kiri unit-unit Plaintif dan sebuah lagi hypermarket yang bernama "Tesco" akan dibina di sebelah kanan unit-unit Plaintif; dan

(c) Kemudahan pinjaman Bank telah disediakan oleh Defendan dan boleh diperolehi bagi semua pembeli-pembeli untuk projek tersebut di mana Defendan akan menanggung kos guaman untuk Perjanjian Jual Beli dan pinjaman bank.

[14] These representations were averred in the supporting affidavit of the plaintiffs in encl. 3A at para 6.

[15] In the supporting affidavit of the plaintiffs, plaintiffs averred that the representations was made by the defendant's sales and marketing manager, one Tan Beng San. The defendants claimed that this was not pleaded by the plaintiffs in the statement of claim. Further, the defendant states that there was no affidavit from the said Tan Beng San to support this contention by the plaintiffs.

[16] However, my perusal of the statement of claim at para. 5 and 6 of the statement of claim, states that the payment of the deposits for the purchase of the two units was premised upon the representation of the defendant's representative that the defendant had obtained the development order to develop the said project on or before February 2010 and that the plaintiffs made the deposit payment to the defendant on 24 December 2009.

[17] In fact, *vide* encl. 12 which is an affidavit affirmed by the credit administrative manager of the defendant, who confirms that such representation was made. Para 5(b) of the affidavit in encl. 12 states:

> (b) ... saya adalah Pengurus yang bertanggungjawab dan diamanahkan oleh pengarah saya iaitu Encik Lim Ching Choy untuk berurusan dengan Plaintif-Plaintif berkelayakan mengesahkan representasi-representasi yang telah diberikan kepada Plaintif-Plaintif seperti mana dalam perenggan 6 Afidavit Plaintif (Lampiran 3A).
>
> (c) Saya mengatakan bahawa akibat pertelingkahan dalaman yang berterusan dan demi keadilan, Pengurus Urusan defendan telah bersetuju untuk mengembalikan wang-wang bayaran kepada Plaintif-Plaintif dan saya telah diarahkan oleh Pengarah Urusan Defendan untuk memproses bayaran balik wang tempahan Plaintif-Plaintif yang tertunggak. Akan tetapi, pertelingkahan dalaman syarikat Defendan telah menjejaskan bayaran ini. Dakwaan defendan jelas adalah remeh dan spekulasi untuk fakta yang tidak diketahui tetapi sekadar membuat penafian kosong tanpa apa-apa amanah dari Pengarah Urusan defendan pada masa material ...

[18] The credit administrative manager of the defendant confirms the representations were made by the defendant to the plaintiffs. It is the plaintiffs' case that the payment of the deposits for the two units was due to the representation that were made to them.

[19] It is also stated in the affidavit in encl. 12 that the internal disputes in the management of the defendant has affected the financial position of the defendant. It is also affecting and stalling the said project and these are within public knowledge as widely reported in the Bursa Malaysia and newspapers. To date the present and previous management are still involved in the legal tussle in numerous ongoing court suits between them.

[20] In fact, the defendant at p. 161 of its Annual Financial Report 2009 published on June 2010 states that there is still no development order for the said project which is still pending approval from DBKL (refer to para (d) at p. 161 exh. LKL4 of encl. 7). This is contrary to what has been represented to the plaintiffs ie, that the defendant had obtained the development order to commence the project on 21 December 2009. The facts show that there was no commencement of the project on 21 December 2009. Not only that, there was no development order obtained as yet. Clearly this falls under s. 56 of the Contracts Act 1950. The effect of this is that the contract becomes voidable at the option of the plaintiffs.

[21] Further, a third party developer, Pioneer Haven Sdn Bhd had entered a private caveat on the development land to claim its competing interest with the defendant on the said development land (refer LKL4 of encl. 7).

[22] The defendant had also admitted that the defendant had defaulted on numerous payments of interest and principal in respect of banking facilities granted by Ambank (M) Sdn Bhd, CIMB Bank Berhad and RHB Bank Bhd (refer to p. 64, para. (1) and p. 75 exh. LKL4 of encl. 7). The development land was charged CIMB Bank and due to the default, there is a risk of foreclosure on the development land.

[23] The group and the company reported net losses of RM34.70 million and RM33.85 million respectively (refer LKL4 of encl. 4). The company also admitted a negative cash flow of RM7.31 million for year ended 31 December 2009 and expressly admitted that the existence of material uncertainties which may cast doubts on the ability of the group and of the company to continue as a going concern and maybe unable to realize its assets and discharge their ability in the normal course of business. Given the material uncertainties of the defendant and the commencement of the project, thus it is not surprising that the plaintiffs' application for any loan facility for the purchase of the units was declined by the banks despite the representation by the defendant that various financial facilities are provided by the defendant to assist the purchasers to obtain their loan to finance the purchase.

[24] The law on representation has been stated in the Federal Court Case of *Tan Chong & Sons Motor Co Sdn Bhd v. Alan McKnight* [1983] 1 CLJ 77; [1983] 1 CLJ (Rep) 394 where Salleh Abas FCJ stated that:

> ... it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

[25] The case of *Tan Chong & Sons Motor Co Sdn Bhd* relied on the judgment of Lord Denning in the case of *Bently v. Harold Smith Motors* [1965] 2 All ER 65.

[26] The case of *Tan Chong & Sons Motor Co Sdn Bhd* was recently relied and adopted by the Court of Appeal in the case of *Kuthubul Zaman & Anor v. TJB Development Sdn Bhd & Anor* [2010] 8 CLJ 529 (Civil Appeal No J-04-154-2008).

[27] In the Supreme Court case of *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 CLJ 1, where the facts of the case are that, during negotiations for a bridging loan, the manager of Hong Leong Bank orally represented to the 2nd appellant that Hong Leong Bank would furnish the 1st appellant with end financing facility. Although the bridging loan was fully disbursed to the 1st appellant, the end finance facility was never made available. The respondents/defendants denied that there was implied or express representations made by the manager. Based on the above representation of the manager, the appellants instituted claim for damages contending negligent misrepresentation. It was held by Lamin Mohd Yunus PCA that:

> The oral representation of the manager substantiated by the certainty of availability of the end finance conveyed by the letter of offer ... must necessarily constitute a fundamental breach by Hong Leong that went to the root of the contract ...

[28] It was further stated in the judgment in the *Kluang Wood products Sdn Bhd*'s case that the learned trial judge came to a conclusion that there was indeed misrepresentation and said:

> ... This representation, even by implication, is well grounded by the said letter. The impression about certainty of the availability of the end-finance which was evidently derived from negotiations between Chew and Pang went to support the representation by the letter as pleaded ...

> ... On evidence relating to the representations made by Pang to Chew, it is not unfair or unreasonable conclusion that what Pang had represented Chew gave the latter the impression on certainty of the availability of the end-finance ...

[29] Based on the representation of the defendant, ie, essentially that the project would take off in February 2010 and that various banks financial facilities are provided by the defendant to assist the purchasers to obtain their loan to finance the project, the plaintiffs were induced to enter into the contract with the defendant and paid the deposits for the two units. These representations have clearly proven to be untrue.

[30] Premised on the principles as enunciated in the abovestated cases, these representations was intended as a warranty. The representation was intended to be acted on and the plaintiffs have acted upon it. Hence there has been a fundamental breach by the defendant that went to the root of the contract/agreement between the plaintiffs and the defendant.

[31] Therefore from the above, it is clear that the defendant is unable to perform its side of the bargain and it would be unjust to retain the deposits paid by the plaintiffs. The plaintiff has rightfully issued the termination notice dated 15 April 2010 which the defendant failed to respond. Thus the defendant ought to refund the deposits which have been paid to the defendant.

[32] The plaintiffs are also seeking for an order from court for compensation of RM60,460 being "loss of investment opportunity" of the deposits which have been paid by the plaintiffs to the defendant.

[33] The plaintiffs submit that it was incorporated purely for investment holding in real property, land houses, dwelling places and buildings. The fact that the deposits were placed in the hands of the defendant has deprived the plaintiffs of investment opportunities due to the inability of the defendant to deliver the project to the plaintiff. This is allowed under s. 74 and 76 of the Contracts Act 1950 which naturally arose out of the breach by the defendant and it is a forseeable loss to the plaintiffs.

Conclusion

[34] Therefore based on the above, I allowed encl. 3 prayer (a) ie, the defendant is to refund the deposits paid of RM604,600.

[35] For prayer (b) the loss of investment opportunities as a result of the deprivation of the use of RM604,600, is to be assessed on a date to be fixed.

[36] For prayer (c) interest prayed is only in relation to prayer (a) which will commence on the date of filing of the suit ie, 13 May 2010.

[37] Interest on prayer (b) will only be granted after assessment of damages.

[38] Costs to the plaintiffs.